UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TOTAL SECURITY MANAGEMENT ILLINOIS 1, LLC

Case 13-CA-108215

and

INTERNATIONAL UNION SECURITY POLICE FIRE PROFESSIONALS OF AMERICA (SPFPA)

RESPONDENT TOTAL SECURITY MANAGEMENT ILLINOIS 1, LLC'S REPLY TO THE GENERAL COUNSEL'S ANSWERING BRIEF

I. INTRODUCTION

Pursuant to Section 102.46(h) of the Board's Rules and Regulations, Respondent Total Security Management Illinois 1, LLC ("TSM" or the "Company"), submits this Reply to the General Counsel's Answering Brief in Response to Respondent's Exceptions to the Decision of Administrative Law Judge Arthur Amchan ("ALJ") dated May 9, 2014.

The ALJ's recommended decision rests exclusively on the Board's now invalid decision in *Alan Ritchey, Inc.*, 359 NLRB No. 40 (2012), a decision rendered void *ab initio* by the United States Supreme Court in *NLRB v. Noel Canning, et al.*, 573 U.S. __ (June 26, 2014). As such, the controlling precedent applicable to this case is set forth in *Fresno Bee*, 337 NLRB 1161-1186-7 (2002), where the Board held that Section 8(a)(5) of the Act does not require pre-imposition bargaining over discretionary discipline. Under *Fresno Bee,* it is undisputed that the Company did not violate the Act and that the Complaint must be dismissed; counsel for the General Counsel makes no attempt to argue otherwise. Rather, counsel for the General Counsel's Answering Brief[1] merely (and mistakenly) assumes, without any substantive argument or citation to authority, that should the Board elect to adopt its holding in *Alan Ritchey,* it may

[1] References to counsel for the General Counsel's Answering Brief appear as "Answering Brief, p.__."

properly do so retroactively as opposed to prospectively only. Given the considerable uncertainty regarding the precedential effect of *Alan Ritchey* that existed at the time of the events at issue in this case, and the likelihood that the decision would be invalidated, any decision by the current, validly appointed Board to overrule *Fresno Bee* should, as it was in *Alan Ritchey*, be applied prospectively only.

Moreover, counsel for the General Counsel's argument regarding the validity of the Acting General Counsel's appointment under the Federal Vacancies Reform Act, 5 U.S.C. § 3345 *et. seq.* ("FVRA") plainly misinterprets the requirements of the FVRA and improperly relies on ambiguous legislative history in the face of clear statutory language. Finally, counsel for the General Counsel's assertion that the Regional Director was authorized to issue the Complaint irrespective of the invalidity of his appointment (due to the lack of a quorum) is without factual or legal support.

II. IF THE BOARD ELECTS TO ADOPT *ALAN RITCHEY* ANEW, AND OVERTURN *FRESNO BEE*, IT SHOULD NOT APPLY ITS DECISION RETROACTIVELY

As a result of the Supreme Court's decision in *Noel Canning*, the Board's decision in *Alan Ritchey* is void because two of the three Board members involved in the decision (Griffin and Block) were not validly appointed. *Fresno Bee*, the Board's last pronouncement on an employer's bargaining obligations with respect to discretionary discipline while engaged in first contract negotiations, therefore remains valid precedent. Although counsel for the General Counsel is correct in noting that the current Board is, of course, free to overturn prior precedent *if* it determines for itself that such precedent misinterprets or is contrary to the Act, any decision to do so should be applied prospectively only because retroactive application would result in "ill effects" on the Company and is not necessary to effectuate the purposes of the Act. *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). As explained in *Levitz*, "the propriety of

retroactive application … is determined by balancing any ill effects of retroactivity against 'the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.'" *Id.* at 729 (quotations omitted). In conducting this balancing test, the Board considers "the reliance of the parties on preexisting law, the effect of retroactivity on accomplishment of the purposes of the Act, and any particular injustice arising from retroactive application." *SNE Enterprises,* 344 NLRB 673 (2005). When substituting new law for old law that was reasonably clear, retroactive application must always comport with "notions of equity and fairness." *Epilepsy Foundation of Northeast Ohio v. NLRB,* 268 F.3d 1095, 1102-03 (D.C. Cir. 2001).

In the present case, the Board's now invalid decision in *Alan Ritchey* purported to overrule *Fresno Bee* which, until then, clearly established the proposition that employers had no pre-imposition duty to bargain over discretionary discipline. *Fresno Bee* was decided in 2002 and thus had been the Board's established precedent on the issue for a decade. In fact, just nine months prior to its *Alan Ritchey* decision, the Board approved an administrative law judge's reliance on *Fresno Bee* in recommending dismissal of an allegation that the employer had violated the Act by discharging unit employees without prior notice and pre-imposition bargaining. *Pennsylvania State Correction Officers Assn.,* 358 NLRB No. 19 (2012) (where employer applies pre-disciplinary procedures that limit discretion, no pre-imposition bargaining requirement). Moreover, within just one month after the Board issued its *Alan Ritchey* decision and two months before the discharges at issue in this case, the U. S. Court of Appeals for the District of Columbia issued its decision in *Noel Canning* holding that President Obama's recess appointments to the Board were invalid. Thus, at the time of the discharge decisions, the Company had more than a good faith basis to conclude that *Alan Ritchey* was not valid precedent and that it could instead rely on the long-standing and clear rule set forth in *Fresno Bee. See*

Epilepsy Foundation, 268 F. 3d at 1102 (employer entitled to act in conformity with prevailing law).

Given the obvious legal uncertainty that surrounded the *Alan Ritchey* decision at the time the Company acted, combined with the fact that the decision itself amounted to a 180 degree departure from the long-standing rule established in *Fresno Bee*, it would be manifestly unjust to require the Company to comply with the *Alan Ritchey* rule prior to the time such rule was clearly and properly established as controlling Board law. This is particularly true in light of the fact that the Company would have no way of knowing which parts, if any, of the *Alan Ritchey* rule the current Board might adopt or how it might modify the rule. And, as the improperly seated *Alan Ritchey* Board itself recognized, such retroactive application would not be essential to achieving the policy objectives of whatever new rule the current Board might adopt and would expose the Company to significant financial liability. For these reasons, if the Board is going to announce a rule that is different than the rule announced in *Fresno Bee*, such rule should be applied prospectively only.

III. COUNSEL FOR THE GENERAL COUNSEL MISINTERPRETS SECTION 3345(B)(1) OF THE FVRA

In attempting to rebut the Company's argument that the Acting General Counsel was not lawfully appointed under the FVRA at the time the Complaint issued, counsel for the General Counsel relies on a flawed construction of the FVRA's provisions that is based solely on the statement of a single senator buried in the FVRA's legislative history. *See* Answering Brief, p. 3. Counsel for the General Counsel's interpretation of the controlling provisions of the FVRA is contradicted by the statute's plain language, unsupported by applicable principles of statutory

construction and has been rejected by the two federal court decisions to have considered the issue in the context of the Acting General Counsel's appointment.[2]

The Federal Vacancies Reform Act, 5 U.S.C. § 3345, et. seq. ("FVRA"), sets forth the circumstances under which a person can be appointed to serve as an acting officer in a position requiring Senate confirmation in the event the incumbent dies, resigns or is otherwise unable to fulfill her duties. First, section 3345(a)(1) provides that the first assistant "shall" perform the functions of the position (i.e., automatic temporary succession). Second, section 3345(a)(2) provides that, "notwithstanding" section 3345(a)(1), the President "may" appoint a person who already holds a position subject to Senate confirmation. Third, section 3345(a)(3) provides that, "notwithstanding" section 3345(a)(1), the President "may" appoint an officer or employee who has served in the agency for at least 90 days and has a pay grade of GS-15 or above. 5 U.S.C. §§3345(a) (1) – (3). Section 3345(b)(1) sets forth circumstances under which a person may <u>not</u> serve as an acting officer. This section provides that once the President nominates a person to fill the vacancy on a permanent basis, such person may not serve as an acting officer ***<u>unless</u>*** such person has served as the first assistant for a period of more than 90 days during the 365-day period preceding the position becoming vacant. *Id.* at §3345(b) (1).

Contrary to counsel for the General Counsel's argument, the limitations of section 3345(b)(1) apply to *all* appointments made under section 3345(a) and not just to those made under section 3345(a)(1)(first assistants). At the outset, there is simply nothing in the plain statutory language that suggests that the section 3345(b)(1) limitations were intended to apply only to appointments under section 3345(a)(1). Counsel for the General Counsel points only to

[2] In stating that the Company's argument "is based on the ruling of a district court, *Hooks v. Kitsnap Support Services, Inc.*, 2013 WL 4094344 (W.D. Wash., Aug. 13, 2013)," Counsel for the General Counsel overlooks the fact that the Company's argument is also based on *Hooks v. Remington Lodging & Hospitality, LLC*, 2014 BL 74425, 198 LRRM 2802 (Dist. Ct. Alaska, Mar. 18, 2014). It is, in fact, the *Remington Lodging* case that contains the more complete analysis of the applicable FVRA provisions.

the statement of Senator Thompson contained in the legislative history; however, as the Company noted in its Brief in Support of Its Exceptions, not only is Senator Thompson's statement later contradicted by the statement of Senator Byrd, but, more importantly, legislative history should not be used in the face of clear statutory language. Brief in Support of Exceptions, p. 8, n. 2. Moreover, if, as argued by counsel for the General Counsel, section 3345(b)(1) applied only to appointments of first assistants, the provisions of section 3345(b)(1)(A)(i) (which apply only to first assistants) would be rendered meaningless. The canons of statutory construction militate against such interpretations. *Remington Lodging,* 2014 BL 74425 at p. 2809 n. 53. Finally, counsel for the General Counsel notes, somewhat oddly, that section 3345(a)(3) was added to give the President a third category of potential appointees (in addition to first assistants or other Senate-confirmed officials). Answering Brief, p. 3. As addressed by the court in *Remington Lodging*, however, reading section 3345(b)(1) to apply to all appointments under section 3345(a) does not interfere with the goal of expanding the pool of potential appointees because section 3345(b)(1) is not triggered unless and until the President nominates the appointee to fill the position on a permanent basis (as he did with Acting General Counsel Solomon). *Id.*

Counsel for the General Counsel also appears to take some issue with the Company's argument that the Acting General Counsel's actions in this case cannot be salvaged by the *de facto* officer doctrine, but does not adequately develop her argument on this point. Answering Brief, p. 4, n. 2. Counsel asserts that the Supreme Court, in *Ryder v. United States,* 515 U.S. 177 (1995), distinguished between statutory and constitutional challenges when applying the *de facto* officer doctrine and that the Company, in relying on *Kitsnap*[3], overlooks this distinction.

[3] Counsel for the General Counsel's reference to *Kitsnap* here is an oversight – the Company clearly cites *Remington Lodging* as its support for this argument.

Counsel for the General Counsel fails to explain, however, how this distinction purports to apply to the present case. Although *Ryder* did involve a constitutional challenge, direct challenges to an officer's statutory qualifications to act are subject to the same analysis. *See Nguyen v. United States*, 539 U.S. 69, 77-79 (2003) (granting direct attack based on statutory challenge).

The Acting General Counsel's temporary appointment became invalid in January of 2011 when the President nominated him to fill the position on a permanent basis and the *de facto* officer doctrine does not save his delegation of authority to the Regional Director to issue the Complaint in this case. Accordingly, the Complaint should be dismissed.

IV. THE INVALIDITY OF REGIONAL DIRECTOR OHR'S APPOINTMENT PRECLUDED HIM FROM ISSUING THE COMPLAINT ON BEHALF OF THE ACTING GENERAL COUNSEL

Counsel for the General Counsel purports to wish away the significance of the fatal defects in Regional Director Ohr's appointment by alluding to "the independence of the General Counsel in issuing complaints" and noting that, under 29 U.S.C. § 160(b), "any agent or agency designated by the Board for such purposes shall have the power to issue a complaint…." What counsel ignores, however, is that the only delegation of authority involved in this case is the standard delegation under 29 C.F.R. § 102.15 pursuant to which the General Counsel has authorized the Regional Directors to issue complaints. Because the Regional Director's appointment was invalid, he does not fall within the class of individuals covered by the delegation of authority set forth in 29 C.F.R § 102.15. Moreover, this case is unlike *Richardson Chem. Co.*, 222 NLRB 5, 6 (1976), relied upon by counsel for the General Counsel, in that *Richardson* involved a validly appointed Regional Director who had received specific authorization from the General Counsel to designate the Assistant to the Regional Director as Acting Regional Director for a period not to exceed 30 days. The record in the instant case contains no evidence of any supplemental delegation of authority applicable to any individual or

class of individuals. Accordingly, even assuming the Acting General Counsel had been validly appointed, Regional Director Ohr was not authorized to issue the Complaint on his behalf.

V. CONCLUSION

For all of the reasons stated herein, and in its Exceptions and Brief in Support, the Board should sustain the Company's Exceptions to the ALJ's decision. Further, the General Counsel has failed to establish that the Company has violated Sections 8(a)(1) or (5) of the Act or that the issuance of the Complaint was legally valid. The Complaint should therefore be dismissed in its entirety.

Respectfully submitted this 7th day of July, 2014.

TOTAL SECURITY MANAGEMENT
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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2014, I caused the foregoing Respondent Total Security Management Illinois 1, LLC's Reply to General Counsel's Answering Brief to be electronically filed via the NLRB E-Filing System and served by e-mail upon the following parties:

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